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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re ANGELICA T., a Person Coming
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

TERESA B. et al.,

Defendants and Appellants.

D043485

(Super. Ct. No. EJ1909-C)

APPEALS from a judgment of the Superior Court of San Diego County, Gary
Bubis, Referee. Affirmed.

Teresa B. appeals the judgment terminating her parental rights to her daughter, Angelica T., under Welfare and Institutions Code section 366.26.¹ Also appealing is Angelica's sister, Amanda L. The appellants assert the court abused its discretion when it denied each appellant's section 388 modification petition. The appellants also challenge the sufficiency of the evidence supporting the findings that the section 366.26, subdivisions (c)(1)(A) and (c)(1)(E) exceptions to terminating parental rights did not exist. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In November 2000, the San Diego County Health and Human Services Agency (the Agency) filed a section 300 petition on behalf of two-year-old Angelica and removed her from Teresa's custody. The petition alleged she was at risk because Teresa used drugs on a daily basis and did not provide the child with a suitable home. The Agency also removed 12-year-old Amanda L. and 11-year-old Samantha L., Angelica's half-sisters, and filed petitions on each child's behalf.²

In December 2000, the court made a true finding on Angelica's petition, and the next month declared her to be a dependent, removed her from Teresa's custody, and ordered reunification services. In February 2001, the social worker learned Teresa had moved to North Carolina. She returned by October, and the court ordered her to attend the Substance Abuse Recovery Management System program (SARMS). Her compliance with SARMS was, for the most part, poor. She tested positive for

¹ All statutory references are to the Welfare and Institutions Code.

methamphetamine, did not submit to some urinalysis screenings, did not attend some required meetings, had unexcused absences from her treatment facility, and did not submit her required 12-step verifications.

In April 2002, Teresa waived her right to receive reunification services and moved to North Carolina. That fall, the court placed the three siblings in long-term foster care.

In January 2003, Angelica was placed with David and Doreen L. Because they wanted to adopt her, the court scheduled a section 366.26 hearing. In the summer of 2003, the court placed Samantha and Amanda with Teresa in North Carolina. Later that year, Teresa and Samantha and Amanda filed section 388 modification petitions seeking vacation of the section 366.26 hearing and Angelica's return to Teresa's custody.

In December, the court denied both section 388 modification petitions. Contemporaneously, the court held the section 366.26 hearing, found Angelica was adoptable and none of the section 366.26, subdivision (c)(1) exceptions applied and terminated parental rights.

DISCUSSION

I.

The appellants assert the court abused its discretion in denying their section 388 modification petitions. Under section 388, a parent may petition the court to change, modify, or set aside a previous court order. The petitioning party has the burden of showing, by a preponderance of the evidence, that (1) there are changed circumstances or

² The petitions filed on behalf of Samantha and Amanda are not at issue here.

new evidence, and (2) the proposed modification is in the child's best interests. (§ 388; *In re Jasmon O.* (1994) 8 Cal.4th 398, 415- 416.) Whether a previous order should be modified and whether a change would be in the child's best interests are questions within the sound discretion of the juvenile court. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) The court's order will not be disturbed on appeal unless the court has exceeded the limits of legal discretion by making an arbitrary, capricious, or absurd determination. (*Ibid.*)

A.

The appellants assert they established changed circumstances because the evidence showed Teresa was sober and participating in individual therapy, had completed a second parenting course and had maintained communication with Angelica, and the court had placed the older siblings with her. However, the allegations that she maintained communication with Angelica and had the older siblings placed with her did not constitute changed circumstances or new evidence because the court knew these facts before the appellants brought their petitions.

The most critical issue before the court was Teresa's drug use, because she had used drugs for 20 years. When the children were removed, she admitted to daily drug use. She has had periods of sobriety followed by relapse. She tested positive for drugs in June 2002. At that time, she was not attending Alcoholics Anonymous or therapy and did not have a sponsor. She was in denial about the effect drugs had on her life. Almost one year later, she had still not completed her required services, participated in individual

therapy, attended Alcoholics Anonymous meetings, participated in random drug testing, or obtained a sponsor.

By the December 2003 hearing, Teresa had been sober for over one year. However, notwithstanding her sobriety, the court did not abuse its discretion by finding her circumstances were only changing and had not yet changed. Teresa had not begun regularly participating in Alcoholics and Narcotics Anonymous meetings until mid-October 2003. She had attended meetings three times per week for only the past three weeks. Although she was on her sixth step in the program, she could not remember the fifth step. She could not remember the name of one person who sponsored her for more than one year. Moreover, she previously relapsed after periods of sobriety.

Further, Teresa's therapist acknowledged substance abusers commonly relapse. Because he never worked with Teresa on the underlying causes of her drug use, the court could infer relapse was a risk. Although Teresa's progress is commendable, the evidence showed that her circumstances with regard to her drug abuse were changing, which is insufficient for the court to grant the petitions. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 48-49.)

B.

Even assuming Teresa established her circumstances had changed, to gain reversal, she had to show the court abused its discretion by concluding vacating the referral order was not in Angelica's best interests. The record shows no abuse of discretion. When examining whether a moving party has established sufficient best interests to warrant the relief requested, we examine the strength of the bonds the child

has with his or her biological parent as compared to the strength of the bond the child has with the foster parents. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531-532.)

Here, the record shows that Angelica has a much stronger bond with her foster parents than she does with Teresa, likely because Teresa did not see the child for one year. Angelica referred to her foster parents as "Mommy" and "Daddy" or "Mom" and "Dad," and identified them as her parents. She refused to be separated from Doreen except when she went to preschool and was similarly attached to David. She was happy in her current placement, was easily comforted by her foster parents, loved them, and wanted to live with them "forever." They have cared for her needs and provided her with a stable, secure, and attentive home environment.

In contrast, Angelica was not strongly bonded with Teresa. Since Teresa moved to North Carolina in April 2002, Angelica did not ask about, talk about, or ask to telephone her. She was not distressed after visits and telephone calls with Teresa. She missed Teresa, but it was not important to her to live with her. She was satisfied talking with her on the telephone for 20 to 30 minutes per week.

All the experts believed Angelica needed to be in a stable home, such as that provided by her foster parents. Teresa asserts the court's ruling incorrectly assumed she could not provide a stable home. However, Teresa historically had been unable to do so as evidenced by this referral and a substantiated referral in 1998 for severe neglect. Further, the social worker had expressed concerns about her care of Amanda and Samantha. Those children had missed numerous days of school and were failing some of their classes. Amanda had attended only one therapy session and Samantha had attended

only two therapy sessions. Given these concerns and Angelica's strong bond with her foster parents, the court did not abuse its discretion in denying the appellants' section 388 modification petitions.

II.

The appellants challenge the sufficiency of the evidence supporting the finding that Teresa did not have a beneficial relationship with Angelica within the meaning of the section 366.26, subdivision (c)(1)(A) exception. Once a court determines a child is likely to be adopted, the burden shifts to the parent to show termination of parental rights would be detrimental to the child under one of the exceptions listed in section 366.26, subdivision (c)(1). (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.) If the trial court determines the parent has not met that burden, "we must affirm . . . if the ruling is supported by substantial evidence." (*Ibid.*)

"Adoption, where possible, is the permanent plan preferred by the Legislature." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.) If the court finds a child cannot be returned to his or her parent and is likely to be adopted if parental rights are terminated, it must select adoption as the permanent plan unless it finds termination would be detrimental to the child under one of five specified exceptions. (§ 366.26, subd. (c)(1).) This exception to the adoption preference to the applies if termination of parental rights would be detrimental to the child because "[t]he parents . . . have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (*Ibid.*)

A.

Here Teresa did not establish the first prong of the section 366.26, subdivision (c)(1)(A) exception. Although she had regular telephonic contact with the child and four in-person visits between July and December 2003, she did not visit the child between April 2002 and April 2003. Admittedly, Teresa could not visit because she lived in North Carolina, but she chose to move and not to visit. Because the statute requires "regular visitation," and Teresa did not visit for one year, she did not satisfy the first prong of the statute.

B.

Even though Teresa had regular contact with Angelica, she did not demonstrate she had a beneficial relationship with her. We have interpreted the phrase "benefit from continuing the relationship" to refer to a "parent-child" relationship that "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent[-]child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent[-]child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

To meet the burden of proof for this statutory exception, the parent must show more than frequent and loving contact or pleasant visits with the children. (*In re*

Derek W. (1999) 73 Cal.App.4th 823, 827.) "Interaction between natural parent and child will always confer some incidental benefit to the child. . . . The relationship arises from the day-to-day interaction, companionship and shared experiences." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) The parent must show he or she occupies a parental role in the child's life, resulting in a significant, positive emotional attachment between child and parent. (*Ibid.*; *In re Elizabeth M.*, *supra*, 52 Cal.App.4th at p. 324.)

Admittedly, Teresa acted parentally with Angelica during the four in-person visits. However, the social worker did not believe Angelica had a beneficial parent-child relationship with Teresa. Angelica did not view Teresa in a parental role. As discussed in part I.B., *infra*, she was not very attached to Teresa, but was attached to her foster parents and viewed them as her parents. Her foster parents, not Teresa, met her needs. Further, Teresa had not regularly visited her or been involved in any aspect of parenting for the year preceding the hearing. She had not demonstrated an interest or ability to provide daily care for Angelica and had relied upon others to parent her.

The social worker acknowledged Teresa's love for and bond with Angelica and that Angelica enjoyed her time with Teresa. However, she believed the bond did not outweigh the benefits a permanent plan could provide. The social worker believed Angelica deserved a consistent and secure home environment. One psychologist believed Angelica's "most pressing need" was a stable, reliable, and predictable home; that need was met by her foster parents. Staying in such a home was the only way she would be able to learn to trust people over a long period of time and make meaningful interpersonal connections. Neither appellant introduced any contrary expert evidence.

Finally, to establish the section 366.26, subdivision (c)(1)(A) exception, the appellants were required to show Angelica would suffer detriment if her relationship with Teresa were terminated. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Neither appellant introduced any such evidence. Substantial evidence supports the court's finding that the section 366.26, subdivision (c)(1)(A) exception is inapplicable.

III.

The appellants challenge the sufficiency of the evidence supporting the finding that the section 366.26, subdivision (c)(1)(E) exception did not apply. That subdivision provides an exception to termination of parental rights if "[t]here would be substantial interference with a child's sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption." (§ 366.26, subd. (c)(1)(E).) We review a finding that the section 366.26, subdivision (c)(1)(E) exception does not apply using the substantial evidence standard of review. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.)

Here, Angelica has a bond with Samantha and Amanda.³ However, to establish the exception, the appellants had to prove that terminating parental rights would result in

³ We question the closeness of the bond between Angelica and her sisters. Angelica did not ask about her siblings between visits or to telephone them. She was not interested in talking to them for more than 20 to 30 minutes at a time. She was not upset when she

a substantial interference with the relationship between the siblings. (§ 366.26, subd. (c)(1)(E).) They made no such showing. Angelica's caregivers were supportive of maintaining the siblings' relationships and have facilitated visits in their home. They were willing to maintain contact between Angelica and her siblings if parental rights were terminated and would allow visits if Samantha and Amanda were in San Diego. They believed Angelica should know her siblings. The social worker believed the caretakers would maintain the sibling relationship. They facilitated weekly contact and allowed additional contact. Teresa and Amanda did not establish there would be substantial interference with the sibling relationship.

One psychologist believed Angelica should have ongoing contact with her siblings and terminating that relationship would have a negative psychological impact on Angelica in the future. However, she drew no conclusions as to the benefits of legal permanence as opposed to Angelica's long-term emotional needs because she did not have any information regarding the relationship Angelica had with her foster parents or Teresa. Further, she believed that if Angelica had a close relationship with her foster parents and was ambivalent about her relationship with Teresa, she should remain with

was removed from the home in which she and her siblings were living, and adjusted well to living without them, displaying no emotional nor behavioral difficulties. When asked to draw a picture of her family, she did not include her sisters. She did not tell a psychologist she wanted her siblings to play a meaningful part in her everyday life. She understood that her siblings would not live with her and her adoptive parents, but nonetheless wanted to live there forever.

her foster parents and her relationship with her siblings would not outweigh the need for a secure and permanent home.⁴

The social worker believed the nature of Angelica's relationship with her siblings did not outweigh the benefit and permanency of having a stable permanent home. Likewise, one psychologist who evaluated Angelica believed she needed a permanent, stable home. We infer the court credited this testimony, a determination we may not reweigh. (*In re Casey D.*, *supra*, 70 Cal.App.4th at pp. 52-53.) Substantial evidence supports the court's finding that the section 366.26, subdivision (c)(1)(E) exception is inapplicable.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

McDONALD, J.

McINTYRE, J.

⁴ Teresa asserts we should not rely upon the psychologist's response to a hypothetical question. However, we consider her response because the evidence showed Angelica had a close relationship with her foster parents and did not have a close relationship with Teresa.